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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 31.

MASSACHUSETTS BONDING AND INSURANCE
COMPANY AND KATHLEEN F. CROWLEY,
ADMINISTRATRIX OF THE ESTATE OF
JEREMIAH C. CROWLEY,
PETITIONERS,

v.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved:	
28 U.S.C. 1346(b)	3
28 U.S.C. 2674	3
Mass. G.L. (Ter. Ed.) C. 229, Sec. 2C	3
Mass. G.L. (Ter. Ed.) C. 229, Sec. 1	4
Statement of the Case	5
Summary of Argument	6
Argument	11
I. The Federal Tort Claims Act, as amended, construed literally, requires an award of full compensatory damages in this case	11
II. The decision of the Circuit Court of Appeals is based upon a policy of statutory interpretation which is in direct conflict with that adopted by this Court for the interpretation of the Tort Claims Act in <i>Indian Towing Co. v. United States</i> , 350 U.S. 61	17
III. The award of full compensatory damages in the case is in harmony with the policy of the United States of providing for the award of compensatory damages measured by pecuniary loss for wrongful death	20
IV. No incongruity or discrimination results from the allowance of the recovery of full compensatory damages against the United States under the circumstances of this case	23
Conclusion	29

CITATIONS

Cases:

	Page
<i>American Stereodores, Inc., v. Porello</i> , 330 U.S. 446	20
<i>Arnold v. Jacobs</i> , 316 Mass. 81	11, 14
<i>Arruda v. Director General of Railroads</i> , 251 Mass. 255	11
<i>Atchison, Topeka & Santa Fe R.R. v. Nichols</i> , 264 U.S. 348	15
<i>Dalehite v. United States</i> , 346 U.S. 15	19, 20
<i>Feres v. United States</i> , 340 U.S. 135	11, 19, 21
<i>Heath v. United States</i> , 85 F. Supp. 196 (N.D. Ala.)	24
<i>Indian Towing Co. v. United States</i> , 350 U.S. 61	8, 17, 18, 19
<i>Jackson v. Anthony</i> , 282 Mass. 540	15, 24
<i>McGrath v. Tobin</i> , R.I., 103 A.2d 795	24
<i>Oliveria v. Oliveria</i> , 305 Mass. 297	26
<i>Porter v. Sorell</i> , 280 Mass. 457	11, 26
<i>Slater v. Mexican National R.R. Co.</i> , 194 U.S. 120	8, 15
<i>Smith v. Condry</i> , 1 How. 28	8
<i>United States v. Yellow Cab Co.</i> , 340 U.S. 543	18

Statutes:

Federal Tort Claims Act,	
28 U.S.C., 1346(b)	2, 5, 11
28 U.S.C., 2402	22
28 U.S.C., 2674	3, 5, 6, 11, 17
28 U.S.C., 2680(d)	21
60 Stat. 842	11
61 Stat. 722	11
Death on the High Seas Act, 46 U.S.C. 761-768	20, 23
Merchant Marine Act, 46 U.S.C. 688	21
Public Vessels Act, 46 U.S.C. 781-790	20
Suits in Admiralty Act, 46 U.S.C. 741-752	20
U.S. Employers Liability Act, 45 U.S.C. 51-59	21

Index.

iii

Page

1935 Colorado Stats. c. 50, sec. 1, as amended by Laws 1951, p. 338, sec. 1	25n.
Conn. Gen. Stat. Supp. 1951, sec. 1392(b)	24n.
District of Columbia 1951 Code, 16-1201	22
Mass. Death Statute, General Laws (Ter. Ed.) c. 229, sec. 2C, as amended	3, 5
1949 Missouri Rev. Stats. 537.070	25n.
1941 New Mexico Stats. Anno. 24-104, as amended by 1947 Laws, c. 125, sec. 1	25n.

Miscellaneous:

61 Harv. L. Rev. 113, 166-169	24n.
26 Indiana L.J. 428, 440; n. 40	24n.
48 W. Vir. L.R. 255, 257	24n.

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JEREMIAH C. CROWLEY,

PETITIONERS,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The judgment of the District Court for the District of Massachusetts in favor of the plaintiffs and assessing damages in the sum of \$60,000 was entered without an opinion (R. 11). The opinions of the Circuit Court of Appeals for the First Circuit on the defendant's appeal from this judgment and on the plaintiffs' petition for rehearing are reported at 227 Fed.2d 385.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 31, 1955 (R. 24). The plaintiffs' petition for rehearing was denied on December 15, 1955 (R. 37). The petition for writ of certiorari was filed on February 1, 1956 and was granted on March 5, 1956 (R. 38). The jurisdiction of this Court rests on 28 U.S.C. 1254.

Question Presented

Whether the actual or compensatory damages recoverable from the United States under the Federal Tort Claims Act, as amended, for a wrongful death caused by an employee of the United States in Massachusetts are limited to \$20,000., the maximum amount of punitive damages recoverable under the Massachusetts punitive death statute from a private employer for a wrongful death under like circumstances.

Statutes Involved

The relevant provisions of the Federal Tort Claims Act, as amended, are as follows:

28 U.S.C. Sec. 1346(b):

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of prop-

erty, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Sec. 2674, as amended:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

The relevant provisions of the Massachusetts Death Statutes are as follows:

Mass. General Laws (Ter. Ed.) C. 229, Sec. 2C, as amended by Acts of 1951, C. 250:

Except as provided in sections one, two and two A, a person who by his negligence or by his wilful, wanton or reckless act, or by the negligence or wilful, wanton or reckless act of his agents or servants while engaged in his business, causes the death of a person

in the exercise of due care, who is not in his employment or service, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or of that of his agents or servants, to be recovered in an action of tort, commenced, except as provided by sections four and ten of chapter two hundred and sixty, within two years after the injury which caused the death by the executor or administrator of the deceased, to be distributed as provided in section one.

Mass. General Laws (Ter. Ed.) C. 229, Sec. 1, as amended by Acts of 1949, C. 427, Sec. 1:

If the life of a person is lost by reason of a defect or a want of repair of or a want of a sufficient railing in or upon a way, causeway or bridge, the county, city, town or person by law obliged to repair the same shall, if it or he had previous reasonable notice of the defect or want of repair or want of railing, be liable in damages not exceeding one thousand dollars, to be assessed with reference to the degree of culpability of the defendant and recovered in an action of tort commenced within two years after the injury causing the death by the executor or administrator of the deceased person, to the use of the following persons and in the following shares:—

(1) If the deceased shall have been survived by a wife or husband and no children or issue surviving, then to the use of such surviving spouse.

(2) If the deceased shall have been survived by a wife or husband and by one child or by the issue of one deceased child, then one half to the use of such surviving spouse and one half to the use of such child or his issue by right of representation.

(3) If the deceased shall have been survived by a wife or husband and by more than one child surviving either in person or by issue, then one third to the use of such surviving spouse and two thirds to the use of such surviving children or their issue by right of representation.

(4) If there is no surviving wife or husband, then to the use of the next of kin.

Statement of the Case

This is an action against the United States under the Federal Tort Claims Act, as amended, 28 U.S.C. Secs. 2671-2680, brought in the United States District Court for the District of Massachusetts to recover money damages for the wrongful death of Jeremiah C. Crowley, which occurred at the Watertown Arsenal, Watertown, Massachusetts, December 22, 1952. The action was commenced by the Massachusetts Bonding and Insurance Company, insurer of the deceased's employer under the Massachusetts Workmen's Compensation Laws. Subsequently, the plaintiff, Kathleen F. Crowley, Administratrix of the estate of the deceased, joined in the action as party plaintiff. Jurisdiction was conferred upon the United States District Court by 28 U.S.C. Sec. 1346(b). After trial, the District Court (Wyzanski, D. J.) found and ruled that Crowley's death was caused by the negligent act of a government employee, that the United States was liable for compensatory damages measured by the pecuniary injuries to Crowley's widow and children pursuant to the provisions of the second paragraph of 28 U.S.C. Sec. 2674, that such damages totaled \$60,000. and that the damages in this case are not limited by the maximum and minimum figures set forth in the Massachusetts Death Statute, Mass. G.L. (Ter. Ed.) C. 229, Sec. 2C (R. 10). Judgment was entered in favor of the plaintiffs for \$60,000. damages in accordance

with these findings and rulings (R. 11). The United States appealed to the Circuit Court of Appeals.

The findings of the District Court as to liability and the amount of pecuniary injuries were not challenged on appeal and the sole question presented was whether or not the damages recoverable against the United States in this case may exceed the statutory maximum of \$20,000. contained in the Massachusetts Death Statute (R. 14). The Circuit Court of Appeals concurred with the District Court in holding that Massachusetts Death Statute is purely punitive and that the damage must be measured by the pecuniary injuries to those for whose benefit the action was brought under the terms of the second paragraph of 28 U.S.C. Sec. 2674, as amended. However, the Circuit Court ruled that when such compensatory damages exceed the maximum amount of punitive damages that can be assessed under the Massachusetts Death Statute against a private employer for a wrongful death under like circumstances they must be cut down to that amount (R. 23, 24).

Summary of Argument

Under the Tort Claims Act as originally enacted there could be no recovery against the United States for wrongful death caused by actionable misconduct of a Government employee in a state such as Massachusetts, which has a death statute providing for the recovery of punitive damages only, because of the prohibition against the award of punitive damages in actions against the United States. In 1947 Congress undertook to provide for reparation for such deaths by amending the Act to add the provision now contained in the second paragraph of U.S.C. Sec. 2674. This provision in most precise and clear language says that in such instances, “—the United States shall be liable for actual or compensatory damages, measured by the pecu-

niary injuries resulting from such death to the persons respectively, for whose benefit the action was brought—", in lieu of whatever punitive damages are prescribed by the local law. It is obvious that a literal construction of the provision added by this amendment requires the award of the full compensation damages as assessed by the District Court in this case. The plaintiffs further maintain, contrary to the opinion of the Circuit Court, that when viewed as a whole, this section, as amended, requires the same conclusion for the reasons set forth at length in this brief and which may be summarized as follows:

(1) The Congressional intent is clearly manifested to discard completely the rules for assessing punitive damages prescribed by the local death statute and to substitute therefor the rule for measurement of compensatory damages which Congress has written into the Tort Claims Act.

(2) The liability which the United States assumed by the 1947 amendment cannot be equated to the liability of a private individual under like circumstances because no private individual is under liability for the payment of compensatory damages for causing wrongful death in a place which allows the recovery of punitive damages only. By this amendment Congress authorizes a compensatory death action against the United States in places having punitive death acts, adopting the rules of the local punitive statute for determination of liability, who may sue and for whose benefit suit may be brought, but substituting a completely new set of rules for determining the damages. Thus, the United States becomes liable for a wrongful death caused by an employee only when a private individual under like circumstances would be liable, and to the same persons; but the damages assessed in consequence of such liability are those specified by the Congress in this enactment, in lieu of whatever damages of punitive nature a private

individual under like circumstances must pay. By the express mandate of Congress an exception is made to the general rule that the United States shall be liable "in the same manner and to the same extent" as a private individual; but the principle that the United States shall be liable only when a private individual "under like circumstances" is liable has been preserved.

This right of action for compensatory damages is the creation of Congress, and, in accordance with established principles, the law which is the source of an obligation to provide reparation for wrongful death "—determines not merely the existence of the obligation, *Smith v. Condry*, 1 How. 28, but equally determines its extent." *Slater v. Mexican National RR Co.*, 194 U.S. 120, 126.

(3) The decision of this Court in *Indian Towing Co. v. United States*, 350 U.S. 61, rendered November 21, 1955, requires the affirmance of the judgment of the District Court in this case. In *Indian Towing Co.*, it was decided by this Court that the liabilities which the United States assumed by the express language of the Tort Claims Act should not be curtailed by judicial interpretation. The refusal of this Court to depart from the plain language of this Act in limiting the liability of the United States in a manner which might be deemed equitable but which is not in accord with the express language of the Act would seem to settle the fundamental issue of the present case.

(4) The United States government has a firmly established policy of providing reparation for wrongful death in the form of compensatory damages measured by pecuniary loss to the survivors, without any arbitrary limitations on such damages. The great majority of the jurisdictions in which the Tort Claims Act is effective also deem it most appropriate to provide for the award of compensatory damages without arbitrary limits for wrongful death.

Hence, it was consistent and appropriate for Congress to select this form of remedy for wrongful death claims arising under the Tort Claims Act in places which have punitive statutes only, when it amended the Act to insert the special provisions applicable to such claims against the United States.

(5) The Massachusetts Death Statute provides for the recovery of damages ranging from \$2,000. to \$20,000. depending upon the degree of culpability of the defendant. The Circuit Court concedes that to apply the minimum limitation to death actions under the Tort Claims Act would result in the imposition of punitive damages on the United States (R. 32). However, it would carry over the maximum limitation of \$20,000. and make this the ceiling for whatever compensatory damages are assessed under the formula provided by the Tort Claims Act (R. 23, 24). This ruling is based upon the assumed premise that Congress could not have intended to allow the assessment of unlimited damages when private individuals under like circumstances are subjected to limited liability even though of a different kind.

Such an interpretation is unwarranted because it not only contravenes the express language of the Act, but it is illogical, unjust and discriminates against Massachusetts claimants. When the Congress rejected liability for punitive damages and substituted "in lieu thereof," the liability for actual or compensatory damages measured by pecuniary loss, it stated in forceful and crystal clear language that all provisions of the local statute relating to the manner of fixing the damages, punitive in nature, were rejected. Such a death statute as exists in Massachusetts cannot be compared with any limited compensatory death statute, for no truly compensatory statute guarantees a minimum recovery. The assurance furnished to claimants under the Massachusetts statute of a minimum recovery

without proof of injury or damage is a valuable right. To take away this right and offer in substitution the right to such compensatory damages as may be proven, but subject to the same maximum limit as the punitive damages, is grossly unfair to Massachusetts claimants. Furthermore, it conflicts with the obvious purpose of the insertion by Congress of the words "in lieu thereof," after describing the way the compensatory damages should be computed on a wrongful death claim arising in a jurisdiction having only a punitive death statute.

Argument

I. THE FEDERAL TORT CLAIMS ACT AS AMENDED, CONSTRUED LITERALLY, ~~REQUIRES AN AWARD OF FULL COMPENSATORY DAMAGES IN THIS CASE~~

The Federal Tort Claims Act was first enacted in 1946 (60 Stat. 842). Sec. 410(a) of that act included the jurisdictional provisions now set forth in 28 U.S.C. 1346, (b), and the provisions imposing liability upon the United States now contained in the first paragraph of 28 U.S.C. 2674. Congress amended this Act in 1947 (61 Stat. 722), to add the provision now contained in the second paragraph of 28 U.S.C. 2674. This second paragraph is applicable to the facts in this case because the Massachusetts Death Act in force at the time of this accident was punitive in nature. This is clearly shown by the express language of that Act and by the decisions of the Massachusetts Supreme Judicial Court. See *Arnold v. Jacobs*, 316 Mass. 81; *Porter v. Sorell*, 280 Mass. 459; *Arruda v. Director General of Railroads*, 251 Mass. 255.

As stated in *Feres v. United States*, 340 U.S. 135, 140-141, that portion of the original Tort Claims Act now contained in 28 U.S.C. 1346(b), merely confers jurisdiction upon the United States Courts. "We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for Courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law." The law defining the nature and extent of the liability assumed by the United States for wrongful death occurring under the circumstances of this case is set forth in the second paragraph of Section 2674. Hence, we must look to the language of this paragraph, when read in context with the

other provisions of this section, to find the law applicable to the issue raised in this case.

Sec. 2674, as amended, has three interrelated but distinct parts. First, it provides for the assumption by the United States of liability for ordinary tort claims in the following language:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances—"

Then follows the exclusion of certain liabilities, i.e.:

"—but the United States shall not be liable for interest prior to judgment or for punitive damages."

The third portion of this section, contained in the second paragraph and added by the 1947 amendment, deals with the liability of the United States for wrongful death, occurring in a place where a private individual under like circumstances is liable for punitive damages only, in the following fashion:

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Prior to the 1947 amendment there could be no recovery against the United States for a wrongful death in states which permits the recovery of punitive damages only in death actions. When this was called to its attention Congress amended the Act by adding this third provision. Having determined that the United States should provide some reparation for wrongful death in this situation Congress had the choice of either subjecting the United States to liability for punitive damages, as provided by the local death statute, or of undertaking to spell out and define the exact nature and extent of the damages for which the United States should become responsible. It chose to leave the flat prohibition against the award of punitive damages in actions against the United States as it was, and to add this new provision granting the right to compensatory or actual damages in lieu of the punitive damages recoverable from a private individual under like circumstances.

The intention of Congress to substitute the compensatory measure of damage for the punitive, but to adopt all other provisions of the local punitive death statute for the determination of liability of the United States, is necessarily implied from the language used to describe the situation in which this provision is applicable. In language that cannot possibly be misconstrued Congress has stated that whenever the local law would require the payment of punitive damages only for wrongful death caused by actionable misconduct of an employee of the United States, the United States shall be liable for the actual or compensatory damages, "in lieu thereof." Thus, Congress adopts all the local rules for determining the circumstances under which liability is imposed, who may bring suit, and for whose benefit the suit may be brought, but substitutes a completely new set of rules for determining the damages.

The liability which the United States so assumes is different in kind from the liability of a private individual

under like circumstances. No private individual causing wrongful death in Massachusetts or in any other jurisdiction having a purely punitive death statute, is subject to liability for actual or compensatory damages. Punitive damages, fixed arbitrarily or measured by degree of culpability, bear no relation whatsoever to the actual or compensatory damages flowing from a wrongful act. The two can never be equated, for the elements considered in determining the amount of each are entirely different.

The punishment deserved for negligent or reckless conduct which causes wrongful death is entirely unrelated to the fair compensation for the injuries suffered by the survivors of the deceased victim. This inequality is emphasized when consideration is given to the Massachusetts Death Statute which imposes penalties ranging from \$2,000. to \$20,000. on each individual guilty of causing wrongful death. This penalty is imposed without any regard whatsoever to the pecuniary loss suffered by the survivors of the deceased. It is imposed on each of several wrongdoers who may contribute to cause a wrongful death according to the degree of culpability of each and the liability is several, not joint, so no rights of contribution exist among the wrongdoers. *Arnold v. Jacobs*, 316 Mass. 81, 84. Hence, a particularly culpable act which causes the death of a person with no dependents or near relatives would warrant the imposition of the maximum penalty of \$20,000. in a death action brought for the benefit of distant next of kin under the Massachusetts Death Statute, and if two or more persons contribute to cause the wrongful death, each may be held liable for that amount. On the other hand, the wrongful death of a man who is the sole support of a large family, and for whose death no amount of money could compensate for the injury thereby suffered would only warrant the imposition of the minimum penalty of \$2,000. when the

wrongful act causing death was an inadvertent breach of the required standard of due care.

Death actions are wholly the creation of statutes, never having been recognized at common law. A statute creating a right of action for wrongful death necessarily determines the method of assessing damages. *Atchinson Topeka & Santa Fe RR v. Nichols*, 264 U.S. 348; *Slater v. Mexican National RR Co.*, 194 U.S. 120; *Jackson v. Anthony*, 282 Mass. 540, 545-546. The Commonwealth of Massachusetts has no compensatory death statute, but only allows an action for damages which are wholly punitive. Consequently, when Congress decided that the United States should pay compensatory damages for wrongful death caused by a government employee in Massachusetts, it was necessary for Congress itself to impose this liability upon the United States. That Congress did this intentionally and without equivocation is evident from the categorical statement, "the United States shall be liable for actual or compensatory damages—" under the circumstances recited. It would be difficult, indeed, to frame a more forceful statement of the intention to subject the United States to liability for the actual or compensatory damage measured by pecuniary loss in this particular situation.

If Congress had so wished, it could have limited those damages to the maximum allowed under the local punitive statute. That it did not do so should be sufficient answer to any contention that the damages measured in accordance with the rules the Congress has laid down should be limited to the maximum amount of the punitive damages recoverable under state law. Since this cause of action for wrongful death against the United States exists by force of the federal law, not the state law, we must look to that federal law alone to find the nature and extent of the rights of action created. Not only has Congress carefully defined the way damages are to be measured but it says they are

to be "in lieu" of the punitive damages prescribed by the state statute. In effect it has said these damages are to be awarded regardless of and in substitution for whatever punitive damages the law of the place deems appropriate.

To award suitable compensation for injury due to actionable misconduct of governmental employees is the manifest purpose of the original Tort Claims Act. By giving to the 1947 amendment the plain meaning of its language the unintentioned omission of rights of recovery against the United States for wrongful death in places having punitive death statutes is corrected. When the law of the place where the actionable misconduct occurs has rules for translating into money damages the extent of the injury due to wrongful death, those rules are adopted. When wrongful death occurs in a place which has a punitive death act, and there is no local law furnishing rules for determining compensatory damages, the Congress has written its own rules. Under these rules, as set forth in the clear and unambiguous language of the 1947 amendment, the pecuniary loss to the survivors of the deceased for whose benefit the action is brought is the only factor to be considered.

That Congress could have provided some different remedy is admitted. That Congress selected this remedy of all the possible remedies for wrongful death cannot be disputed. That Congress fully intended to grant the right to full compensatory damages, measured by pecuniary loss, as the remedy for wrongful death in this situation, is clearly shown by its careful choice of the language used. When one considers that the sole purpose of the addition made by the 1947 amendment was to provide a suitable compensatory remedy for wrongful death occurring in places which provided none, it imputes to the Congress an inconceivable carelessness in draftmanship to contend that it did not mean what was stated in such plain language.

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED UPON A POLICY OF STATUTORY INTERPRETATION WHICH IS IN DIRECT CONFLICT WITH THAT ADOPTED BY THE COURT FOR THE INTERPRETATION OF THE TORT CLAIMS ACT IN *Indian Towing Co. v. United States*, 350 U.S. 61.

The Circuit Court of Appeals agrees with your petitioners that read literally, and in isolation, the language of the second paragraph of 28 U.S.C. Sec. 2674 requires the award of full compensatory damages in the case at bar (R. 22). However, that Court concludes that when read as a whole, the Tort Claims Act, as amended, does not express with sufficient clarity the intentions of Congress with respect to the matter now in issue, and it becomes the duty of the Court "to ascertain the intention of Congress" by the usual methods (R. 14, 28). The Court then considers the results of a literal interpretation of the pertinent language and finds what it calls an incongruity and discrimination which the Congress could not have intended, in that the United States may be required to pay greater damages than can be imposed upon a private employer in Massachusetts alone of all the States which limit the recovery for wrongful death (R. 22). To remove this incongruity, and what it believes an unintended consequence of giving effect to the language of the second paragraph of the act as written, it has ruled that the maximum limit of Massachusetts Death Statute constitutes the ceiling for compensatory damages recoverable from the United States for wrongful death.

Such intrusion by the Courts by judicial interpretation to modify or curtail the liabilities assumed by the United States in the Tort Claims Act was condemned in the recent case of *Indian Towing Co. v. United States*, 350 U.S. 61. In answer to the government's argument for an interpretation of the Act which would exclude liability for negligence

in maintenance of a lighthouse because state agencies incur no such liability when performing similar functions, this Court states, at page 68: "The language of the statute does not support the government's argument." Thus, the principle of giving full effect to the language of the Act and of construing liberally the grant of remedies therein contained was reaffirmed. See *United States v. Yellow Cab Co.*, 340 U.S. 543, 555.

The plaintiffs submit that the Circuit Court decision in the instant case is based upon a policy of statutory interpretation which is directly contrary to that so recently reaffirmed by this Court in the *Indian Towing Co.* case. In the instant case, the Circuit Court, finding no equivalent liability of an individual for compensatory damage for wrongful death under Massachusetts law, would limit the amount of recovery to the maximum which the state law allows by way of punitive damages in order to carry out what it presumed to be the intent of Congress. That Court renounces and condemns a literal interpretation of the pertinent language of the Act which would subject the United States to greater liability for compensatory damages than the maximum punitive liability imposed upon a private individual under like circumstances.

The majority of this Court, by the *Indian Towing Co.* decision, refused to recognize any such paramount legislative intent to so limit the liabilities expressly assumed by the plain language of the Tort Claims Act. The ruling of this Court that the language pertinent to the facts in that case must be given its plain meaning is equally applicable to the present case. When it thus refused to permit a departure from the express language of the Act to limit the liability of the United States in a manner which may be deemed equitable but which is not in accord with the express language of the Act, it decided the fundamental

issue of the present case in favor of the plaintiffs' contentions.

It should be noted that the Circuit Court rendered its decision on October 31, 1955, whereas the *Indian Towing Co.* case was not decided until November 21, 1955. Also, the plaintiffs' petition to the Circuit Court for a rehearing was filed on November 30, 1955, before plaintiffs' counsel became aware of the tenor of that important decision of this Court. This time sequence explains why no reference appears in the Circuit Court's opinions to the *Indian Towing Co.* decision which has clarified and reaffirmed the policy of giving a literal and liberal construction to the provisions of the Tort Claims Act that became somewhat clouded by statements in *Feres v. U. S.*, 340 U.S. 135 and *Dalehite v. U. S.*, 346 U.S. 15 to the effect that the liability of the United States should not exceed the liability imposed by local law in analagous situations.

In *Indian Towing Co.* the claim was for negligence in maintenance of a lighthouse. In *Dalehite* one of the principal claims was for negligence of the coastguard in fighting fire. The minority opinion in the *Indian Towing Co.* case emphasizes the fact that, although presented with ample opportunity to amend the Tort Claims Act following the *Dalehite* decision, Congress did nothing and thus indicated that it was content with an interpretation of the Act which denied liability of the United States for negligence in fighting fires. The plaintiffs maintain that their contentions in the case at bar stand on much firmer ground than those of the claimants in *Indian Towing Co.* Congress was presented with the problem of providing for wrongful death claims arising in places having only punitive death statutes, and it did something about it. A new provision was added to provide expressly for the award of compensatory damages measured by pecuniary loss in such cases. The very thing was done which the minority in *Indian Towing Co.*

says should be done, if the full implications of the *Dalehite* decision are to be avoided. At 350 U.S. 75, Mr. Justice Reed states for the minority: "If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The Courts are not the legislative branch of the Government." Consequently, even on the interpretation given by the minority of this Court to the effects of the rulings in *Dalehite*, the present case is clearly distinguishable; and adherence to the principle of giving effect to the intention of the Congress, as manifested by the legislation it has enacted, requires affirmance of the judgment of the District Court in this case.

III. THE AWARD OF FULL COMPENSATORY DAMAGES IN THIS CASE IS IN HARMONY WITH THE POLICY OF THE UNITED STATES OF PROVIDING FOR THE AWARD OF COMPENSATORY DAMAGES MEASURED BY PECUNIARY LOSS FOR WRONGFUL DEATH.

By the Suits in Admiralty Act, enacted in 1920, (46 U.S.C. 741-752) and the Public Vessels Act, enacted in 1925, (46 U.S.C. 781-790) the United States assumed liability for the payment of full compensatory damages measured by pecuniary loss for wrongful death on the high seas in accordance with the provisions of the Death on the High Seas Act (46 U.S.C. 761-768), and for such damages as the local law provides when wrongful death occurs within coastal or inland waters where local law is effective. See *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 458-460.

A clear parallel exists between the treatment of claims for wrongful death against the United States resulting from maritime activities of the Federal Government under these statutes, and such claims against the United States under the Tort Claims Act. Under the maritime statutes

referred to a wrongful death on the high seas gives rise to a claim for unlimited compensatory damages based upon pecuniary loss. However, if such a claim arises from wrongful acts in coastal or inland waters, damages are awarded in accordance with the law of the place having jurisdiction of the same. Under the Tort Claims Act, a wrongful death occurring in a place which provides no compensatory remedy, but confers only the right to punitive damages which Congress deems improper, the damages are measured by the pecuniary loss in exactly the same fashion as where the death occurs on the high seas. On the other hand, a claim for wrongful death arising in a place which provides a compensatory remedy is satisfied by the award of damages in accordance with the law of that place. As so construed, the Tort Claims Act is in perfect harmony with the Suits in Admiralty Act and the Public Vessels Act; and the maintenance of actions against the United States under these acts is provided for by 28 U.S.C. 2680(d). It was stated in *Feres v. U. S.*, 340 U.S. 135, 139, with reference to the Tort Claims Act, "This act, however, should be construed to fit so far as will comport with its words into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." It is submitted that the construction for which the plaintiffs contend accomplishes this result.

That Congress deems compensatory damage measured by pecuniary loss to be the most appropriate remedy for wrongful death is shown by United States Employers Liability Act (45 U.S.C. 51-59), the Merchant Marine Act (46 U.S.C. 688), as well as the Death on the High Seas Act referred to above. Each of these Acts creates a wrongful death action for unlimited compensatory damages measured by pecuniary loss. The plaintiffs know of no instance where Congress has created an action for wrongful death and placed an arbitrary limit on the damages recoverable there-

under except in early legislation affecting the District of Columbia, and even there the wrongful death statute has now been revised to provide for unlimited compensatory damages, (See District of Columbia, 1951 Code, 16-1201). The tenor of all this federal wrongful death legislation shows that Congress has recognized that there is no valid reason for placing arbitrary limitations on the compensatory damages recoverable for wrongful death. When no such limits are placed upon the damages for personal injury what conceivable reason can there be for limiting the damages for wrongful death, the supreme and ultimate injury, the injury that transcends all injuries? Compensation by way of money damages at best must fall short of full reparation for wrongful death, even as it does in the case of many personal injuries which maim, disfigure, and destroy the prospect of the enjoyment of a normal human life.

The sole plausible reason for placing limits on the recovery in a compensatory death action is the fear that juries may become so vindictive toward the person or persons causing a tragic death or so sympathetic with the plight of the claimants that excessive verdicts will be awarded. This is hardly a valid reason when no such limits are placed upon the damages for conscious suffering preceding death or upon the damages for serious and disabling personal injuries. Moreover, there is no ground for fearing unreasonable jury verdicts in suits against the United States under the Tort Claims Act, because all such actions are tried before a judge without a jury. (28 U.S.C. 2402)

When Congress was faced with the problem of amending the Tort Claims Act to provide damages for wrongful death in lieu of punitive damage furnished by local law, it was fitting that it should follow the precedent furnished by prior Federal legislation dealing with wrongful death and substitute for punitive damages " . . . the actual or

compensatory damages, measured by pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof." Compare this language with that used to describe the damages under the Death on the High Seas Act, 46 U.S.C. 762, which reads, "The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought—". Is it not evident from a reading of these corresponding provisions that Congress intended the rule of damages under this portion of the Tort Claims Act to be exactly the same as that which it established for death on the high seas many years previous? If it had intended to have the maximum damage limitation of the local punitive death statute apply, would it not have so stated when it used this language of well settled meaning to define the damages? Furthermore, the adoption of this rule for measuring the damages by the pecuniary injury or loss to surviving dependents conforms with the well established policy of the Federal Government of providing this form of reparation for wrongful death in places where the Federal government has chosen to exercise its jurisdiction.

IV. NO INCONGRUITY OR DISCRIMINATION RESULTS FROM THE ALLOWANCE OF THE RECOVERY OF FULL COMPENSATORY DAMAGES AGAINST THE UNITED STATES UNDER THE CIRCUMSTANCES OF THIS CASE.

It is entirely consistent and logical for Congress to respect state policy in limiting compensatory damages for wrongful death, as it has in the Tort Claims Act, by providing that the United States shall be liable only to the same extent as private individuals, and, at the same time, allow the recovery of full compensatory damages when no such policy is present. Massachusetts has no policy, one way or

the other, with respect to this matter of limiting compensatory damages for wrongful death. It allows recovery in its courts of full compensatory damages in wrongful death actions created by the laws of another state, even though that other state will not permit its courts to grant the limited damages provided for by the Massachusetts Death Statute because of its punitive nature. *Jackson v. Anthony*, 282 Mass. 540, 546-547 (1933). *McGrath v. Tobin*, R.I., 103A 2d 795 (1954).

At the present time by death or survival of action statutes, 46 of the 48 states provide for the award of compensatory damages for wrongful death. Only 2 States, Massachusetts and Alabama, have punitive death statutes of general application. Of the 46 states providing compensatory remedies for wrongful death, 33 allow unlimited damages and 13 place maximum limits on the amounts recoverable. The Alabama Death Statute, construed to be punitive, has no maximum or minimum limits on damages. See *Heath v. United States*, 85 F. Supp. 196 (N.D. Ala.). Hence, Massachusetts with its punitive death statute providing for damages ranging from a minimum of \$2,000. to a maximum of \$20,000. is the only state in the Union which has a punitive death statute of general application with arbitrary minimum and maximum limits on damages, although a few states have statutes of this character applicable to deaths caused by railroad and other carriers.¹

¹ See *Developments in the Law: Damages 1933-1947*, 61 Harv. L. Rev. 113, 166-169 for a summary of the types of wrongful death legislation effective in the 48 states. See also 26 Indiana L. J. 428, 440, n. 40 (1951) and 48 W. Vir. L. Rev. 255, 257 (1942) which list 15 states that place limits on the recovery allowed for wrongful death and 33 which allow unlimited damages. Included in the group of 15 states with limitations on damages are Massachusetts, which has a punitive death statute, and Connecticut, which by Gen. Stat. Supp. 1951, Sec. 1392 (b) discarded the maximum limitation on the compensatory damages provided for in its statute. Hence, it now appears that only 13 states, with compensatory death statutes, set

In the light of this summary of the types of wrongful death legislation effective in places covered by the Tort Claims Act and the character of the federal legislation dealing with wrongful death heretofore referred to, it can hardly be deemed incongruous or discriminatory for Congress to substitute unlimited compensatory damages for punitive damages when amending the Tort Claims Act in 1947 to take care of wrongful death claims arising in the few jurisdictions having punitive death statutes. The history of federal legislation on remedies for wrongful death indicates clearly the policy of Congress to provide compensation based upon pecuniary loss for wrongful death wherever it has jurisdiction. The fact that a minority of 13 states by legislative fiat still place limits on the compensatory damages recoverable for this great wrong furnishes no sound reason for the charge that by giving effect to the literal interpretation of this Act there is discrimination against those states. This Act, as amended, merely reflects the congressional intent to respect their policies, and to subject the United States to the same limited liabilities

maximum limitations on the compensatory damages recoverable thereunder. Of the 33 states allowing unlimited damages only Alabama has a death statute construed to be wholly punitive. Connecticut now belongs in this group of states and this makes a total of 33 states which grant the right to unlimited compensatory damages for wrongful death as against 13 which place arbitrary maximum limits on such damages.

In addition to Massachusetts and Alabama which have general death statutes that are wholly punitive in nature, Colorado, Missouri and New Mexico have punitive death statutes applicable to deaths caused by railroads and other common carriers. 1935 Colorado Stats. c. 50, sec. 1, as amended by Laws 1951, p. 338, sec. 1 (damages between \$3000 and \$10,000). 1949 Missouri Rev. Stats. 537.070 (damages between \$2000 and \$10,000). 1941 New Mexico Stats. Anno. 24-104, as amended by 1947 Laws, c. 125, sec. 1 (damages between \$2000 and \$10,000). If the Government were to cause wrongful death while engaged in railroad operations in any of these states, the provision of the Tort Claims Act substituting compensatory for punitive damages will be applicable.

which they deem proper. However, when the local law gives the right to punitive damages only, and the United States declines to subject itself thereto, the grant of the same right of recovery as exist in the great majority of jurisdictions where the Tort Claims Act is operative seems most fitting and appropriate.

Furthermore, the limitation of the amount of compensatory damages recoverable from the United States on a wrongful death claim arising in Massachusetts to the maximum of \$20,000, provided by the Massachusetts punitive death statute cannot be justified on any principles of logic or equity, when the minimum limitation of \$2,500 damages is rejected. The Circuit Court agrees that the minimum limitation cannot be applied in actions against the United States because of the strict prohibition against punitive damages contained in the Tort Claims Act (R. 32). When Congress rejected the punitive measure of damage did it not necessarily reject the maximum and minimum limitations on such damages? The Massachusetts Death Statute is wholly punitive and the limitations on the damages or penalties recoverable thereunder are an integral part of the statutory scheme for supplementing the criminal laws dealing with homicide with punitive death actions imposing penalties which are relinquished by the state to surviving next of kin of the deceased. "Like all punitive legislation the death statutes prescribe the extent of the punishment." *Porter v. Sorell*, 280 Mass. 457, 461. See also, *Oliveria v. Oliveria*, 305 Mass. 297, 301, where this statute was characterized as follows: "Although an action under it wears the aspect of a civil suit and results in compensation to the surviving spouse and next of kin to the extent of the sum recovered, yet the damages are assessed wholly with reference to the degree of culpability of the defendant and constitute in effect a fine levied upon him for his wrongful conduct."

The assurance furnished by the Massachusetts Statute of an award of not less than \$2,000. for every wrongful death, without any proof of injury or damage to the survivors of the deceased, is a valuable right which tends to compensate for the maximum limitation on the possible punitive recovery. No truly compensatory death statute, with or without maximum limitations on the damages recoverable, can give such an assurance. This minimum limitation on damages in the Massachusetts statute makes it utterly impossible to equate the damages recoverable thereunder with those provided by any compensatory statute. It also destroys the basis for Circuit Court's opinion that there would be discrimination against claimants in death actions arising in states having limited compensatory death statutes. If Massachusetts claimants were allowed to recover from the United States their full compensatory damages. In fact, there would be discrimination against Massachusetts claimants if the Circuit Court's ruling were allowed to stand, for they are thereby deprived of the benefit of the Massachusetts minimum limitation on damages, but must bear the burden of the maximum limitation and remit so much of their compensatory damages, measured by pecuniary loss, as exceeds that limit.

When Congress added to the Tort Claims Act the formula for determining the compensatory damages for which the United States shall be liable in places where punitive damages only are awarded for wrongful death and stated that such compensatory damages were "in lieu thereof", it emphasized its intention to substitute completely this compensatory measure of damage for whatever method was provided by the local law for fixing the punitive damages. In effect Congress has said that claimants in wrongful death actions against the United States shall have the right to prove their actual pecuniary loss resulting from such death in lieu of the punitive damages they might be entitled to.

receive under the local law. If the Massachusetts maximum limitation of punitive damages is now carried over and made the ceiling for the amount of pecuniary loss that can be proven, while the minimum limitation on such punitive damages is ignored, the whole force and effect of the words "in lieu thereof" is destroyed. Under such a ruling, Massachusetts claimants are made to suffer the burden of the maximum limitation on the punitive damages recoverable from a private individual under like circumstances, but are deprived of that very valuable right of an assured minimum recovery of \$2000. against a private individual.

Regardless of what may be considered the most fair and equitable solution to the problem of providing for reparation for wrongful death claims against the United States in places allowing the recovery of punitive damages only in actions against private individuals, it is not for the Courts to determine whether or not Congress has enacted the most suitable legislation to take care of such claims. As long as the law enacted can be construed to effect reasonable results, it must be carried out. Certainly, in the situation under discussion, the Congress has set forth in clear language of settled meaning its intention to substitute completely the remedy of compensatory damages measured solely by pecuniary loss to survivors of deceased. This action by Congress is not only consistent with prior federal legislation on this subject but it is in complete harmony with the prime purpose of the Tort Claims Act, which is to provide fair and just compensation for injuries suffered through actionable misconduct of government employees.

Conclusion

Compensatory damages can never be equated to punitive damages. It appears that Congress was well aware of this fact when it chose to substitute an award of compensatory damages measured by pecuniary loss for the punitive damages recoverable for wrongful death under local death statutes. The Circuit Court would do what the Congress could have done but failed to do, that is, place a limit on those damages equal to the maximum punitive liability of a private individual under like circumstances. For the reasons hereinabove set forth your petitioners respectfully submit that the Circuit Court erred in ruling that the damages in this case are subject to that arbitrary maximum limitation and the judgment of the District Court awarding to the plaintiffs their actual or compensatory damages, measured by the pecuniary loss to the persons for whose benefit this suit was brought, should be affirmed.

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